April 12, 2002

William F. Caton
Acting Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Comments – Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information CC Docket Nos. 96-115 and 96-149.

Dear Mr. Caton:

The National Association of State Utility Consumer Advocates ("NASUCA") wishes to file the enclosed *ex parte* comments in the above-cited docket, relating to telecommunications' carriers use of customer proprietary network information ("CPNI").

Very truly yours,

Ken Reif, Director
Dian Callaghan, Administrative Director
Colorado Office of Consumer Counsel
1580 Logan Street, Suite 740
Denver, CO 80203

Dian Callaghan, Chair
NASUCA Consumer Protection Committee

Michael J. Travieso, Chair
NASUCA Telecommunications Committee

NASUCA
8300 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Implementation of the | ) | |
| Telecommunications Act of 1996 | ) | CC Docket No. 96-115 |
| | ) | |
| Telecommunications Carriers' Use of | ) | |
| Customer Proprietary Network Information | ) | |
| And Other Customer Information | ) | |
| | ) | |
| Implementation of the Non-Accounting | ) | |
| Safeguards of Sections 271 and 272 of | ) | CC Docket No. 96-149 |
| The Communications Act of 1934, as | ) | |
| Amended | ) | |

**_EX PARTE_ COMMENTS OF**
**THE NATIONAL ASSOCIATION OF STATE**
**UTILITY CONSUMER ADVOCATES**

April 12, 2002

The National Association of State Utility Consumer Advocates[1] ("NASUCA") submits these *ex parte* comments to inform the Federal Communications Commission ("Commission") of the serious problems encountered by consumers who wish to protect their customer proprietary network information ("CPNI") from disclosure to third parties. NASUCA did not previously submit comments in this matter, but is moved to do so at this time because of a heightened concern for the privacy of the consumers we represent as a result of the events described herein. The consumers we represent have now been subjected to opt-out procedures that fail to meet even minimal standards for informed

[1] NASUCA is an association of 44 consumer advocates in 40 states and the District of Columbia. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

consent. We now have evidence that relying on the wholly inadequate opt-out method permits companies to protect their pecuniary interest at the expense of consumers' privacy interests. Based on the experiences of these consumers, we urge the Commission to re-adopt its opt-in rule.

Recently, Qwest Communications, Inc. ("Qwest"), SBC-Ameritech ("SBC"), and Verizon Communications, Inc. ("Verizon") issued opt-out notices to most of their customers, purportedly to comply with the Commission's disclosure requirements in 47 C.F.R. § 64.2001 et seq. The manner in which these opt-out notices were provided to these consumers, the content of the notices, the roadblocks encountered by consumers who tried to opt-out, the absence of any method to verify that the consumer had effectively opted out, as well as the negligible response rate by consumers to these notices, provide evidence of the failure of opt-out to protect consumer privacy. Moreover, the overwhelmingly vociferous and negative response from Qwest customers, once informed by the media about the opt-out notices, as well as Qwest's own reaction, further demonstrate the inadequacies of the opt-out option. In light of this recent experience, NASUCA supports the comments of the Attorneys General of 39 states ("State Comments") and offers these additional comments.

## I. The Opt-out Approach to Customer Approval Prior to Disclosure of CPNI Is Insufficient to Obtain Informed Consent or Protect Customer Privacy.

The CPNI notices issued by Qwest, SBC and Verizon illustrate why the opt-out approach fails to protect customer privacy. These notices, attached as Exhibit A, clearly demonstrate that telecommunications carriers will not voluntarily provide notices that impede their own economic interests in the sale of highly personal customer information.

These companies have a strong incentive to discourage customers from responding and seeking to prevent disclosure of their CPNI to third parties. For the reasons set forth by the Attorneys General, NASUCA believes that an opt-out approach cannot adequately protect customer privacy and ensure informed consent. Even if the Commission were to adopt detailed and comprehensive rules specifying the form and content of the notice as well as the form, content and method of customer response, the continued use of the opt-out approach will fail to secure informed choice and therefore fail to protect the customers' privacy interests. The fundamental problem with the opt-out approach is that it does not truly secure customer approval. And, the evidence we have to date establishes that telecommunications companies will design opt-out notices and procedures to limit the number of customers who opt-out of the commercial use or sale of their personal information.

The CPNI notices presented in Exhibit A share the following deficiencies:

- They are designed to be ignored or overlooked;[2]
- Each is worded in a confusing way, using legal and technical jargon instead of plain, understandable language;[3]

[2] The Qwest notice, a bill insert mailed during the December holidays, was titled: "Important Notice About Your Qwest Account Information," but then stated, "This Does Not Impact Your Bill." Most consumers did not read further. Those who did had to read through four long paragraphs and then turn to the second page of the notice to find out how to opt-out. The Verizon notice was printed on the customer's bill and was titled "Customer Proprietary Network Information – Special Notice." This technical version of the more common word, "privacy," certainly discouraged consumers from reading further. SBC won the obscurity award by including a small, untitled, nondescript slip of paper in with the monthly bill.

[3] Recently, Qwest sought a local service freeze protection option to prevent local slamming. The company argued that customer notices should be in language recognizable to customers, rather than technical or unfamiliar language they may not understand. Qwest also favored bill inserts, advertising, and carrier calls that would allow "the most number of customers to learn about the program." Qwest stated that while some customers may read their bill inserts, others may not, so bill inserts alone are insufficient. Apparently, technical language and bill inserts alone suffice to notice customers about their privacy, but will not do when the company **wants** customers to opt for local service freezes. (See Qwest Corporation Comments, "In the Matter of Qwest Corporation's Local Service Freeze Protection Option," Minnesota Public Utilities Commission, Docket No. P421/CI-02-75, February 22, 2002)

- It is unclear what the customer must do and by what date;
- It is unclear what will happen if the customer fails to respond;
- It is unclear what information (or the import of that information) will be shared and with whom; and,
- The critical customer information about how to opt out is buried deep in the notice.

Thus, the burden is on the customers to slog through the wording, figure out what to do to protect their private information from disclosure, and then take the time to respond, often encountering delays and other impediments when calling 800 numbers or accessing corporate websites. Obviously, these are significant obstacles for customers to overcome in order to simply protect their own private information from disclosure. The Commission can be sure that if it requires opt-in, these same companies will design and issue notices that suffer none of these deficiencies. The shoe will be on the other foot: the companies will have a strong economic incentive to issue clear notices that encourage their customers to respond, authorizing disclosure.

The *Ex Parte* Comments of the Attorney General of Arizona describe in detail the failures of Qwest's opt-out notice and the resulting public outcry.[4] The Qwest experience is noteworthy for several reasons.

First, it demonstrates that consumers have an expectation that their permission should be required before their customer records are shared. The Rocky Mountain Poll, conducted from January 10 to 17, 2002, reported that 94 percent of Arizona telephone consumers believe Qwest should be required to obtain their permission before disclosing

[4] Ex Parte Comments of the Attorney General of Arizona, CC Docket Nos. 96-115 and 96-149, dated January 25, 2002 ("Arizona Comments").

their customer records. Less than 4 percent supported the opt-out method. Arizona Comments at Exhibit C. The polling organization described this as the most lopsided result in more than 30 years of polling and "underscores growing consumer concerns about information privacy in today's modern telecommunications environment." Id.

The public's expectations are also reflected in the opinions of newspaper editorial boards. Editorials in the major newspapers in Colorado, Arizona and Washington opined in strong opposition to the opt-out approach. The Denver Post editorial put it this way: "We don't much like the offered safeguard that individuals can 'opt out' of the sharing of such personal data. Requiring consumers to make a positive effort to protect their sense of privacy sounds, well, sort of un-American. We favor the notion that corporations shouldn't rush to peddle information they gained in the process of providing a service in exchange for a fee."[5]

Second, the Qwest CPNI notice led to such a public outcry that, to its credit, the company chose to halt any disclosure until the FCC issues its final order adopting opt-in or opt-out.[6] Some 600,000 customers (fully 5 percent of Qwest's 12 million customers) complained about the notice and opt-out approach.[7] While this is an overwhelming number of complaints by any measure, it is also worth noting that only about 4.5 percent of Qwest's customers actually opted out.[8] Does that mean that the other 95 percent approved the disclosure of their customer records? No, not by any reasonable standard. The disconnect between overwhelming opposition to opt-out disclosure and a negligible

[5] "Qwest quest," Denver Post editorial, February 17, 2002.
[6] Qwest decided to scrap the plan after first extending the deadline for response, adding employees to take the calls, developing and implementing a method for confirmation, and promising to re-notice customers after admitting its notice was confusing. The cost to Qwest of the opt-out approach was potentially greater than if it had chosen opt-in. The loss of customer good will is an additional significant cost, even if it cannot be quantified.
[7] "Qwest won't share customers' data," by Kris Hudson, DenverPost.com, January 29, 2002.

response rate show the difficulty of actually satisfying the opt-out requirements. To draw a parallel, if the Commission received 600,000 slamming complaints in one month, it would hardly conclude that because millions didn't complain, consumers don't care about slamming.

The opt-out approach is inadequate to obtain customer approval for disclosure, as the term "approval" is commonly understood – informed consent. The comments filed in this docket by the Attorneys General thoroughly demonstrated the necessity of requiring opt-in to obtain customer approval of disclosure. The Attorneys General pointed to the opt-out notices required under the Graham-Leach-Bliley Act ("GLB") as an example of the inadequacy of this approach. Surveys showed that most consumers never saw, read, or understood such complicated notices. State Comments at 7-9. Unfortunately, Qwest, Verizon, and SBC followed the bad example set by the GLB notices, with the same results.

## II. The Opt-in Requirement for Customer Approval Prior to Disclosure of CPNI Directly and Materially Advances the Government's Interest in Protecting Privacy.

The harm that can come to consumers from disclosure of their customer records was addressed in the comments of the Attorneys General. NASUCA offers similar examples of the potential for consumer harm and the need to protect consumer privacy. NASUCA concludes that the opt-in approach is the only method that affirmatively secures customer approval.

The sale of private information about consumers to telemarketers and list brokers is a lucrative business. Qwest's Data Products Group, for example, sells direct marketing

[8] Id.

lists and touts the value of these lists on its website.[9] Qwest offers more than 20 different list products and advertises that its lists are the most up-to-date available. Qwest's lists allow direct marketers to target customers using 40 demographic qualifiers.

Call records reveal the phone numbers of incoming and outgoing calls – who you call, who calls you, and the length of your calls. This call detail information is a valuable commodity to private investigators, telemarketers, list brokers, information brokers, scam artists, and others.

A customer's private information, such as what phone numbers he or she calls and how often, should not be treated as just another commodity to be sold in the marketplace without the customer's explicit permission. Once disclosed, private information cannot be gathered up and returned to the customer. The customer's proprietary information becomes available to national information brokers who sell it to direct marketers and others who can then resell it for their own purposes. Once in the consumer information marketplace, consumers have no control over who has their personal information and how it is used.

Telecommunications carriers' opt-out notices assure their customers that they only intend to share customer proprietary information with their affiliates, their family of companies. Such assurances lead the customer to believe no harm can come from keeping their private information in the family. However, nothing prevents the affiliate from then disclosing CPNI to other third parties, i.e. directory publishing affiliates selling it to telemarketers. Moreover, the point is that if consumers want to protect their private information from disclosure, it doesn't matter whether it is shared with affiliates of telephone companies or other third parties. The fact that the affiliate is unconstrained

[9] See http://www.qwest.com/pcat/large_business/product/1,1354,98_4_1,00.html

from disclosing CPNI is all the more reason for the FCC to adopt opt-in to protect consumer privacy.

The use to which CPNI can be put and the resulting harm to the consumer is limited only by the imagination of those with an interest in selling it to the highest bidder. The only way to be sure the customer has given explicit and knowing consent to have such information disclosed to third parties is by obtaining their permission before CPNI is released. The opt-out approach provides no assurance that consumer inaction is equal to customer approval or informed consent. State Comments at 7. Without such assurance, the opt-out approach cannot satisfy § 222 of the Act, which requires customer approval before CPNI can be used or disclosed.[10]

If the Commission adopts the opt-out method, then NASUCA strongly urges the Commission to require prior approval of such notices by state regulatory commissions, or adopt detailed rules specifying the form, content and method of the CPNI notice and the manner in which customers may respond. However, neither of these protections cure the inherent problem with the opt-out method, i.e. it does not secure customer approval.

Finally, NASUCA agrees with the Montana Public Service Commission's recommendation that "the FCC should not prohibit states from adopting regulations that go beyond any national regulations, in light of the strong state interest in consumer privacy."[11] In fact, NASUCA recommends that the Commission explicitly permit states to adopt CPNI notice requirements that go beyond those adopted by the Commission.

[10] See 47 U.S.C. § 222(c)(1).
[11] See Letter to the FCC re: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information (CC Docket Nos. 96-115 and 96-149) from the Public Service Commission, State of Montana, dated February 21, 2002.

## III. Conclusion

NASUCA urges the Commission to re-adopt the opt-in approach for telecommunications carriers to obtain customer approval before carriers may share or disclose their CPNI to any third parties. The recent experience with the opt-out notices of Qwest, SBC, and Verizon clearly demonstrate the inadequacy of this mechanism for securing customer approval and protecting consumer privacy. The public outcry after Qwest issued its opt-out notice shows that consumers have an expectation that their affirmative permission will be obtained prior to the release of their customer records.

If the Commission permits carriers to use an opt-out notice, it should issue detailed and specific rules as to the form and content of the notices and customer response method. In the alternative, the Commission could require that the carriers obtain prior approval from state regulatory commissions.

Finally, NASUCA recommends the Commission explicitly permit states to adopt CPNI regulations that offer stronger privacy protections than the rules adopted by the Commission.

DATED this 12th day of April, 2002.

_____/s/_____
Ken Reif, Director
Dian Callaghan, Administrative Director
Colorado Office of Consumer Counsel
1580 Logan Street, Suite 740
Denver, CO 80203

Dian Callaghan, Chair
NASUCA Consumer Protection Committee

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